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IN THE

Supreme Court of the United States

October Term, 1961

No. 167

ROY A. OAKLEY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

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—against—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Roy A. Oakley, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 24, 1961.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit (reproduced in Appendix I) is not yet reported. The United States District Court for the Middle District of Tennessee, Nashville Division, wrote no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 24, 1961. On June

13, 1961 that court entered an order staying the issuance of mandates, pending an application to the United States Supreme Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Is 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment?

2. Are the petitioner's pictures, consisting of female nudes, obscene within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957), and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957)?

3. Should the fact that the defendant in good faith believed his pictures to be not obscene be taken into account in determining his guilt or innocence?

Constitutional and Statutory Provisions Involved

Fifth Amendment:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962:

> "* * * Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it

is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * *"

Statement of the Case

The petitioner was convicted on nine counts of a ten-count indictment (count seven withdrawn), and on a single count of a one-count indictment, charging him with violations of 18 U.S.C. §1461, after a trial before United States District Judge William E. Miller and a jury. Judge Miller sentenced the petitioner to two years imprisonment on each count, all sentences to run concurrently. The United States Court of Appeals for the Sixth Circuit on May 24, 1961 affirmed the Judgment of conviction.

The defendant is a native born American who lived his first six years at Allgood, Tennessee, and since then, except for periods in our Marines, in Gallatin, Tennessee (4a) (references are to pages of petitioner's appendix in the Court of Appeals). He lives with his parents, both of whom are still living (9a). He was in the United States Marines for eleven years, of which seven and one-half years were on active duty from February 1941 to March 1947 and from October 1950 to March 1952 (4a, 6a). He was in the South Pacific from about May 1942 to December 1944 (5a). He was through three campaigns in the Pacific; Guadalcanal, from August to December 1942; New Britain Island

in 1943; and Peleliu Island in September and October 1944 (5a). In these various places he saw thousands of pictures of pin-up girls, which served as morale builders for the troops (5a). He has two honorable discharges, the first one of which he received in March 1947 and the second in March 1952 (6a).

The defendant is a professional photographer (6a). He has been a photographer for 13 years as a civilian (6a). While he was in the service he worked for the camp newspaper at Parris Island, South Carolina for about four or five months, and had several hundred pictures printed during that time (6a).

From 1947 through 1950 the defendant did freelance photography in Gallatin, and sent several pictures to the Nashville papers that were printed, and some in the local papers (7a). He also took 100 of the approximately 102 photographs that appear in a published history of Sumner County (7a). The defendant's home city of Gallatin is in Sumner County (7a). The defendant's business, which is in Gallatin, Tennessee, included the sale of unretouched artistic photographs of the human female nude for the artist, photographer, collector, connoisseur, and nudist. He sold his photographs only to those who certified that they were over 21-years of age.

The defendant never had any intention of violating any statute or of sending any obscene material through the mails. Based on his experience on what he saw while he was in the Marines, what he saw on the newsstands thereafter, and what he received through the mail, particularly various issues of the nudist publications *Sunshine & Health* and *Sun Magazine* he thought, as the courts have stated,

that nudity *per se* was not obscene, and that all of the pictures which he mailed had artistic merit and were not obscene. That is still his position.

During the course of the trial the defendant introduced as evidence of contemporary community standards various representations of numerous nudes in Nashville, Tennessee. He also introduced various issues of a number of periodical publications containing nudes, such as *Time, Life, Gent, Ace, Rouge, Nugget, Playboy, Modern Man, Escapade,* as well as the nudist magazines *Sunshine & Health* and *Sun Magazine,* all of which contained reproductions of the human nude, females as well as males, with many pictures showing nude females and males in the same pictures. He further introduced two volumes of the *Encyclopaedia Britannica* with similar reproductions, as well as various books and pieces of statuary. It is submitted that taking into account contemporary community standards, and the defendant's own intent and conduct, it should be held that he did not violate 18 U.S.C. §1461.

Reasons for Granting the Writ

I.

The Court of Appeals for the Sixth Circuit in holding that the 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, to be constitutional decided an important question of federal law which has not been, but should be, settled by this Court.

A.

The amendment of August 28, 1958, 72 Stat. 962, makes 18 U.S.C.A. §1461 so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment.

All statutes must be reasonably definite. This is a general due process requirement for all legislation, whether federal or state, whether civil or criminal. Moreover the standards of certainty in statutes with criminal sanctions are more exacting than those with civil ones only. As the United States Supreme Court pointed out many years ago in *United States* v. *Reese*, 92 U. S. 214 (1876), through Chief Justice Waite: " . . . Every man should be able to know with certainty when he is committing a crime." At 220.

Or as the Court ruled more recently in *Winters* v. *New York*, 333 U. S. 507 (1948), reversing 294 N. Y. 545, 63 N. E. 2d 98 (1945), through Justice Reed:

> " . . . The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' • • • There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . ." At 515.

Or yet again as the Court ruled in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 242, 243; Connally v. General Constr. Co. 269 U. S. 385, 391-393; A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 239; United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-92; Collins v. Kentucky, 234 U. S. 634, 638; International Harvester Co. v. Kentucky, 234 U. S. 216; Cf. People v. Belcastro, 536 Ill. 144; People v. Licavoli, 264 Mich. 643.) The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

There are many additional cases to the same effect: *Champlin Refining Co.* v. *Corporation Comm'n.*, 286 U. S. 210 (1932); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Collins* v. *Kentucky*, 234 U. S. 634 (1914); *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (1914); cf. *Watkins* v. *United States*,

354 U. S. 178 (1957); *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L. Q. 195, 214-18 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77, 85-86 (1948).

The 1958 Amendment to 18 U.S.C.A. §1461 makes the pertinent part read:

> "Whoever • • • knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed • • •."

This language is too vague and indefinite to meet the due process requirement of the Fifth Amendment.

B.

Moreover, "criminal statutes are to be strictly construed." *Yates* v. *United States*, 354 U. S. 298, 310 (1957).

A further circumstance bearing on the treatment to be accorded to 18 U.S.C.A § 1461, as amended in 1958, is that penal laws are to be strictly construed. On this point Chief Justice Waite in the leading case of *United States* v. *Reese*, 92 U. S. 214, had this further observation:

> "This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. • • •"

There are a multitude of cases to the same effect. For instance, in the recent case of *Yates* v. *United States*, 354

U. S. 298 (1957) this Court held that the word "organize" in the Smith Act referred "only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed 'organizational.'" At 310.

Strictly speaking, 18 U.S.C.A § 1461, as amended in 1958, no longer has any clearly ascertainable meaning.

II.

The Court of Appeals for the Sixth Circuit in affirming the instant judgment of conviction, and the United States District Court for the Middle District of Tennessee, in letting the instant case go to the jury, applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958).

A.

The Supreme Court's prurient interest test for obscenity is a very narrow one.

The Supreme Court's test for obscenity, as laid down in *Roth* v. *United States*, 354 U. S. 476 (1957) is a very narrow one. Only that material is obscene which deals with sex in a manner appealing to the prurient interest of the average person in the community. At 487, 489.

At the 1957 Term, the Court perused the nudist publications *Sunshine & Health* and *Sun Magazine*, and determined them to be not obscene. *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D.C. Cir. 1957), affirming 128 F. Supp. 564 (D.D.C. 1955).

At the same term the United States Supreme Court took a similar approach with reference to the motion picture film "The Game of Love," *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir.), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956). The Supreme Court viewed the film, decided that it was not obscene, and reversed the court below.

At the same Term the Court also gave favorable rulings for individuals in two further cases. In one of these, *One Inc.* v. *Olesen*, 355 U. S. 371 (1958), reversing 241 F. 2d 772 9th Cir. 1957), the Court held a magazine called *One*, which was beamed at homosexuals, to be not obscene.

In a fourth case at the same Term, *Mounce* v. *United States*, 355 U. S. 180 (1957), vacating judgment in 247 F. 2d 148 (9th Cir. 1955), affirming *United States* v. *2400 Copies International Journal*, 34 F. Supp. 490 (D. E. D. Wash. 1955), which involved nudist periodicals as well as two publications which contained only reproductions of human nudes without any text at all, the Court after a confession of error by the Solicitor General, vacated the judgment of the court below and remanded the case to the district court for reconsideration in the light of the *Roth* case. The district judge had included in the standard of obscenity which he had applied that which "offends the sense of propriety, morality, and decency of" the average person of the community. The Court of Appeals for the Ninth Circuit had adopted the district court's standard. But the Supreme Court had laid down the prurient interest test. When this case returned to the district court, the judge held all the publications there involved, even those solely with pictures and without any text at all, to

be not obscene. Civil No. 1286, D. E. D. Wash., August 15, 1958.

On the last day of the next term, June 30, 1959, the Court took similar action with reference to the film "Lady Chatterley's Lover," *Kingsley International Pictures Corp.* v. *Board of Regents*, 360 U. S. 684 (1959). All of the justices, except Mr. Justice Black, viewed the film.

In addition, it is interesting to note that at the last three terms the Court has not found anything to be obscene, whether it be nudist magazines, or motion picture films or a publication beamed at homosexuals. Also the Court has so far lifted the ban on every film to come to court. The list includes "The Miracle," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), reversing 303 N. Y. 242, 101 N. E. 2d 665 (1951); "The Moon Is Blue," *Hilsby Productions, Inc.* v. *Vaughan*, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412; "The Game of Love," *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir. 1957), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956; "La Ronde" (a picture made from Arthur Schnitzler's "Reigen"), *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954), reversing 350 N. Y. 336; 113 N. E. 2d 502 (1953); "Native Son" and "M," *Superior Films* v. *Dept. of Education*, 346 U. S. 587 (1954), reversing 159 Ohio St. 315, 112 N. E. 2d 311 (1953); "Pinky," *Gelling* v. *Texas*, 343 U. S. 960 (1952), reversing 157 Tex. Cr. 516, 247 S. W. 2d 95; and "Lady Chatterley's Lover," *Kingsley International Pictures Corp.* v. *Board of Regents*, 360 U. S. 684 (1959), reversing 4 N. Y. 2d 349, 175 N. Y. S. 2d 39 (1958), reversing 4 A. D. 2d 348, 165 N. Y. S. 2d 681 (3d Dept. 1957).

B.

In *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), the Court recognized that representations of the human nude, without more, are not obscene.

Because of our long history with the human nude in various art forms, and more recently in numerous other forms, our courts have frequently stated that nudity per se is not obscene. See *e.g. Parmelee* v. *United States*, 113 F. 2d 729, 732 (D. C. Cir. 1940); *Maryland State Board* v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833, 838 (1957); *People* v. *Muller*, 96 N. Y. 408, 411 (1884); *People* v. *Gonzales*, 107 N. Y. S. 2d 968, 969 (1951); *Commonwealth* v. *Hueston*, The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956).

Accordingly many cases have held that various portrayals of the human nude were not obscene. See *e.g. Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) (Parmelee's book, Nudism in Modern Life); *Sunshine Book Company* v. *Summerfield*, D. D. C. Civil Action No. 3007/53, July 13, 1953, affirmed 221 F. 2d 43 (1954), cert. denied, 349 U. S. 921 (1955) (numerous issues of the nudist periodicals *Sunshine & Health* and *Sun Magazine*); *State* v. *Lerner*, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1958) (seven issues of the nudist periodical *Sunshine & Health*); *LeBaron* v. *Olesen*, 125 F. Supp. 53 (S. D. Cal. 1954) (Marilyn Monroe coasters); *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), affirming 2 A. D. 2d 941, 156 N. Y. S. 2d 200 (1956) (nudist film *Garden of Eden*); *Matter of Capital Enterprises* v. *Regents*, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) (motion picture *Mom and Dad*, depicting human birth); *Mary-*

land State Board v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833 (1957) (film *Naked Amazon*, showing Camyura Indians in the jungles of Brazil, who live entirely unclothed); *American Museum of Natural History* v. *Keenan*, 20 N. J. Super. Ill. 89 A. 2d 98 (1952) (film *Latuko*, which depicts the life of a nude African Tribe); *Commonwealth* v. *Hueston, The Legal Intelligencer*, Oct. 26 1956, 26 U. S. L. Week 2193 (Photographs of the human nude).

The nudist film *Garden of Eden*, according to the Court of Appeals of New York, "has been shown in 36 States and in many foreign countries." *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 239, 144 N. E. 2d 31, 32 (1957).

Indeed in both the *Mounce* and the *Sunshine Book Company* cases the district courts observed that nudity *per se* was not obscene. In the *Mounce* case *sub nom. United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. E. D. Wash. 1955), the federal district judge stated: "Nudity is not per se obscene." At 493. In the *Sunshine Book Company* case the federal district judge said:

> "First and foremost, nudity is not obscene, per se." 128 F. Supp. 564, 569.

However, neither they nor the Courts of Appeals were able to follow through on these observations. Their errors in this regard the United States Supreme Court corrected, by vacating the judgment of the Court of Appeals for the Ninth Circuit, and by reversing the judgment of the Court of Appeals for the District of Columbia Circuit.

C.

The decisions holding nudity to be not obscene result from the fact that the human nude has been with us in art for more than twenty-five centuries and in many other forms more recently.

We have had representations of the human nude, both male and female, separately and together, in sculpture and painting for more than 2500 years. In this history the Greeks took the first steps. They produced monumental statues of naked youths beginning about the middle of the seventh century B.C. Since then we have had so many examples of the human nude in sculpture and painting that they are too numerous to mention. Human nudes in sculpture, painting and other forms are on exhibition in various museums throughout the country. They have been produced in such widely disseminated publications as the *Encyclopaedia Britannica, Time, Life* and in numerous books on art.

The latest edition of the Encyclopaedia Britannica (1952) in its articles on *Sculpture* and *Sculpture Technique* contains reproductions of Michelangelo's *Slave,* vol. 20, Plate VII, opp. p. 230, and *Evening,* Plate X, Roden's *The Kiss,* Plate VII, opp. p. 198, and *The Bronze Age,* Plate X, opp. p. 230, Donatello's *David,* Plate IV, opp. p. 198, Arthur Lee's *Dawn,* Plate XVII, and *Rhythm,* Plate XI, opp. p. 230, and Maillol's *Torso,* Plate XII. In its article on painting this work contains reproductions of Botticelli's *The Birth of Venus,* vol. 17, Plate VI, Correggio's *Mercury Instructing Cupid before Venus,* Plate VIII, Rubens' *Venus and Adonis,* Plate X, and Titian's *Woman on a Couch,* Plate VIII. The earlier edition of this work in its articles on *Sculpture* and *Sculpture Technique* carries additionally Michelangelo's *Evening,* vol. 20, Plate V, opp. p. 224, Mail-

lol's *Danae,* Plate XIX, opp. pp. 216-217, and Rodin's *Eternal Springtime,* Plate VIII, opp. 226-227 (15th ed. 1937). This edition on painting also shows one of Matisse's *Odalisques,* vol. 17, Plate XVI.

Life magazine reproduced Michelangelo's *The Creation of Man,* Dec. 26, 1959, pp. 25-48, Botticelli's *The Birth of Venus,* Velasquez's *Lounging Venus,* Correggio's *Awakened Danae,* Manet's *Unblushing Olympia,* Titian's *Bathing Goddess,* Rubens' *Three Graces,* Courbet's *Realist Bather,* Renoir's nude painting of his wife, and a nude piece of sculpture by Praxiteles, Oct. 22, 1956, pp. 102-111.

Time reproduced a picture of Michelangelo's statue *David,* March 4, 1946, p. 99; Tintoretto's *Minerva Pursuing Venus,* June 11, 1956, p. 85; and Lucus Cranach's *Adam and Eve,* April 23, 1956, p. 87.

Reference may also be made to some of the numerous recent works on art containing reproductions of the human nude. See e.g. Kenneth Clark, *The Nudes A Study In Ideal Form* (1953); R. Lulies and M. Hirmer, *Greek Sculpture* (Michael Bullock transl. 1957); O'Malley and Sanders, *Leonardo da Vinci on the Human Body* (1952); Rodin (Phaidon 1951); Goldschneider, *The Sculptures of Michelangelo* (2d ed. 1950); Goldschneider, *The Paintings of Michelangelo* (2d ed. 1948); Martinie, *Rodin* (1947).

More recently representations of nude human figures have occurred in other fields than sculpture and painting. Such representations, of both male and female figures, have come to be used pretty freely in almost any field, and to illustrate almost any text. They are used in etching and photography. They are used in medical treatises and jour-

nals. They are used in text books and periodicals. They are used in various works giving sexual instructions and advice.

Almost two decades ago the court in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) thus summarized the situation at that time.

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries, and art catalogues contain many nudes, ancient and modern. Even such a conservative source book as the Encyclopaedia Britannica, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.
>
> "The use of nude figures and photographs in medical treatises and textbooks is also commonly practiced today. * * * " At 734.

Representations of the human nude have increased still more since the time of that opinion. Indeed they have increased substantially. Various of the publications we have cited attest to this fact. So do numerous other events. Such a tightly self-censored group as the movie industry, in the December 11, 1956 revision of its Production Code, permitted the filming of nude infants. The magazine *Variety*, in its October 7, 1957 issue had a front page story about a nudist colony on commercial television in Great Britain. The article tells us "the femme members of the Colony wore big smiles, little earrings—and that's all." In the same month there were two art exhibits in New York City featuring the human nude. One of these showed the nudes of Nicholas Marsicano; the other presented a survey of nudes including works of Renoir, Titian, Picasso, Chagall, Tiepolo Giacometti, Maillol, Boucher, and Schaffner. N. Y.

Times, Oct. 22, 1957, p. 30; 2-3; N. Y. Times, Oct. 30, 1957, p. 23; 2-3. Of the later exhibit art critic Dore Ashton wrote in The New York Times:

> "In 'Nudes Through the Ages' at the Delius Gallery, 24 East Sixty-seventh Street, visitors will see that the human body has been a faithful muse, always presenting new possibilities for expression to the attentive and passionate artist.
>
> "The nude creates a division in art history of its own, a 'subject' classification that offers ideal circumstance for comparative appraisal. There have always been artists, it appears, who thought of the nude as an interesting form, no more no less. In the early Renaissance, those artists made routine crosshatch studies in which they expressed only the rationalized volumes of muscle and bone and little else. In more recent periods, artists interested solely in inanimate metaphors such as the hackneyed female nude—equals—violin.
>
> "These formal drawings prove a minor order when cast together with works by artists who have seen in the nude an inexhaustible symbol of life—of all life, that is . . ." October 30, 1957, p. 23, col. 2.

Yet more recently one of England's leading newspapers prominently displayed the picture of a nude woman taken beside a park statue. Truly the human nude has come to be culturally and judicially accepted as one of the ordinary facts of life.

III.

The courts below in refusing to take into account the good faith of the petitioner in believing his pictures to be not obscene, decided a federal question in a way in conflict with the application decisions of this Court.

The petitioner never had any intention of violating the law. He never had any intention of sending obscene material through the mail.

For many years the petitioner was in the United States Marines. While in the Marines he saw a multitude of pictures of pin-up girls. Since that time he has seen pictures of many nudes in various publications. These publications were not only sold on newstands but also sent through the mails. He particularly observed the many nudes in various issues of the nudist publications *Sunshine & Health* and *Sun Magazine*. He accordingly thought, as the courts have repeatedly stated, that nudity per se was not obscene. If that was true, and if nudist publications were sold, not only on newstands but also went through the mails, he felt that his conduct was entirely legal. As the petitioner explained when Judge Miller called upon him just before sentencing him: "Your honor, I certainly don't feel that I have done anything wrong. I have always felt that the pictures that I sold didn't exceed those in the nudist publications, and that's about the only thing I can think of this moment." (98a).

These circumstances should have been taken into account. As Mr. Chief Justice Warren explained in his concurring opinion in the leading case of *Roth* v. *United States*, 354 U. S. 476, 495 (1957):

> "The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

Reference may also be made to ALI Model Penal Code §207.10(7), comment at 49-51 (Tent. Draft No. 6, 1957). Based on this provision, federal District Judge William C. Mathes, suggested the following jury instruction on good faith and belief as to obscenity:

> "Even though you may find one or more of the pictures involved in the indictment to be obscene, if you should further find that the accused in good faith believed, at the time of any mailing, that such picture or pictures were not 'obscene', then you should find that the defendant did not act with specific intent, and so should acquit him." 27 F. R. D. 157-58 (1961).

CONCLUSION

Since the Court of Appeals for the Sixth Circuit decided an important question of federal law which has not been but which should be settled by this Court, namely that 18 U.S.C. §1461 as amended on August 28, 1958, 72 Stat.

962, did not violate the due process clause of the Fifth Amendment; and since the Court of Appeals for the Sixth Circuit applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957); and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), this petition for a writ of certiorari should be granted.

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APPENDIX

Opinion of United States Court of Appeals

Nos. 14338-9

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROY A. OAKLEY, *Defendant-Appellant.*	APPEAL from the District Court of the United States for the Middle District of Tennessee, Nashville Division.

Decided May 24, 1961.

Before MARTIN, CECIL and O'SULLIVAN, Circuit Judges.

O'SULLIVAN, Circuit Judge. Defendant-Appellant, Roy A. Oakley, was convicted by a jury on nine counts of a ten-count indictment, each of which counts charged him with violation of Section 1461, Title 18, U. S. C. A. (using the mails to distribute, or to give information as to a source from which could be obtained, obscene, lewd, lascivious and indecent articles or things). He was also convicted on the same trial under a one-count indictment charging violation of the same statute. The violations charged in the first indictment were alleged to have occurred prior to a 1958 amendment to Section 1461 of Title 18, and the single count indictment charged a violation alleged to have occurred

after the effective date of such amendment. The district judge denied motions to dismiss the indictments and for acquittal, entered judgments on the verdict, and sentenced appellant to two years imprisonment on each count, all sentences to run concurrently.

On this appeal, defendant relies upon the following contentions: first, that the 1958 amendment to Section 1461 of Title 18, U. S. C., is unconstitutional; second, that the materials involved in appellant's mailings were, as a matter of law, not obscene and that the district judge was therefore in error in submitting such question to the jury; and, third, that appellant, from his experience with what is currently available in magazines, movies and like media of community information and entertainment, had become convinced that what he was doing was all right—he "never had any intention of violating the law."

First. *Constitutional question.* The offenses charged in the ten-count indictment occurred prior to the effective date (August, 1958) of the amendment under question. Only the single-count indictment is, therefore, subject to this attack. Prior to the amendment, the relevant language of Section 1461 read, "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable," etc. This was changed by the 1958 amendment to read, "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, *or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered* by the person to whom it is addressed," etc.

Appellant says that the italicized portion of the above "is not only vague and indefinite, it is meaningless," and, therefore, offensive to the Fifth and Sixth Amendments. The indictment averring an offense committed after the 1958 amendment, charged that on November 22, 1958, appellant "did knowingly cause to be delivered by mail, according to the directions thereon" an obscene picture, giving the name and address of the person to whom it was alleged to have been delivered. We are satisfied that appellant was thereby clearly informed of the offense with which he was charged, and that the statute whose language was thus employed was not infected with any constitutional infirmity. *United States* v. *Petrillo*, 332 U. S. 1, 7, 8; *Collier* v. *United States*, 283 F. (2) 780, 781 (C. A. 4, 1960), cert. denied, 81 Sup. Ct. 746.

Second. *Were defendant's wares not obscene, as a matter of law?* Defendant's argument converts this question into an inquiry as to whether representations of the human nude are, per se, obscene. That is not the matter for decision. In testing whether the district judge should have directed defendant's acquittal, we must determine whether defendant's merchandise was of such character that it was permissible for a jury, "applying contemporary community standards" to find that "the dominant theme of the material, taken as a whole, appeals to prurient interest." *Roth* v. *United States*, 354 U. S. 476, 489.

The material which defendant advertised and sold consisted, in the main, of photographs (not retouched to obscure any detail) of naked young women. The subjects were so posed and slight apparel so added on some of the

pictures, as to enhance the prurient response invited. Defendant's advertising material gave subtle assurance that lustful curiosity would be satisfied by purchase of his material. The market solicited was not limited to persons of discriminating and artistic tastes, or to those whose look at the pictures would be prompted by some scientific or professional concern. No complaint is made of the instructions under which the district judge submitted the case to the jury. We find that it was not error for the district judge to submit the question of defendant's guilt to the jury.

Third. *Should defendant be held to have meant no wrong?* Defendant told of pictures seen by him while in the service. He introduced numerous publications and made reference to other media of information and entertainment currently available to the view of the public. He argues that his material was no worse than these. From his experience with these matters, he was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent. We need not here pass upon the relative merits, or demerits, of defendant's wares and what may be obtained elsewhere. We decline to hold that contemporary sophistication has reached a point whereby to provide this defendant, or anyone else, with a license to prosecute the business of disseminating obscenity. It was for the jury here, under proper instructions and applying "contemporary community standards" in the context of defendant's conduct, to determine his guilt.

Judgments affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 167

ROY A. OAKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21-24) is reported at 290 F. 2d 517.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961. The petition for a writ of certiorari was filed on June 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim, that the statute under which he was prosecuted is unconstitutionally vague and uncertain, is relevant in the present case.

2. Whether the materials which petitioner distributed through the mails were so clearly not obscene that the trial court should not have permitted the case to go to jury.

3. Whether petitioner's opinion that the material he mailed was not obscene was relevant in proving lack of *scienter*.

STATUTE INVOLVED

18 U.S.C. 1461, as amended in 1958, 72 Stat. 962, provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> Every article or thing designed, adapted, or intended * * * for any indecent or immoral use; and
>
> Every article, instrument, substance * * *, or thing which is advertised or described in a manner calculated to lead another to use or apply it * * * for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, * * * or thing may, or can, be used or applied * * * for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, * * * or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on a one count indictment (No. 12,737; R. 8) [1] and on nine counts of a ten count indictment

[1] "R." designates the appendices to the briefs filed in the court of appeals. "T." designates the two volume transcript of the trial which we have lodged with the Clerk of this Court. The exhibits have been certified separately by the clerk of the court of appeals.

(No. 12,638; R. 1-7),[2] charging that he knowingly distributed through the mails obscene photographs and circulars and advertisements giving information as to how and where obscene pictures and books might be obtained. He was sentenced to a term of imprisonment for two years on each of these counts, to run concurrently (T. 427-428). The court of appeals unanimously affirmed (Pet. 21-24).

1. The evidence showed that petitioner conducted a mail-order business in Gallatin, Tennessee, through which he solicited orders for, and distributed through the mails, "art photos, pin-ups, art books, playing cards, French books, novels, cartoon humor, [and] color slides * * *" (T. 249). Using fictitious test names, postal inspector Simon received both solicited and unsolicited advertisements from petitioner, as well as photographs of female nudes (T. 67-69, 114-115). In April 1955, the inspector received an unsolicited circular from petitioner which read in part as follows (G. Ex. 1; T. 70, 72; see count 1, indictment 12,638 (R. 1):

> Dear Sir:
>
> Do you like girls?
>
> We have a photographic collection of busty belles gathered from all over the U.S.A.—carefully selected from our private files—artistic and unretouched; dazzling blondes, bewitching brunettes, flaming redheads. ALL POSED IN THE NUDE.
>
> * * * * *

[2] Count seven of the indictment was dismissed on the motion of the government (T. 380).

The circular went on to state that to receive these pictures the purchaser must certify he was over 21 years of age, qualify as a "photographer, student of photography, commercial artist, painter or sculptor," and agree not to "let anyone know where [he received the pictures], unless they are a very close friend and [he was] absolutely sure they can be trusted" (T. 72). The pictures were priced from $2.00 per set of ten to $12 for 12 sets. Similar advertising materials were received by the postal inspector under other test names. He also ordered and received photographs of completely nude females as well as almost-nudes wearing slight apparel (T. 74-79, 113-116, 119; see, *e.g.*, G. Exs. 3, 9).

In May 1957, witness W. Anthony Browne received from petitioner through the mails an unsolicited circular bearing the title, "Tenth Anniversary Special * * * Breath Taking Beauties Posed Nude", advertising books of nudes with the further comment that "These Books are Banned by Bluenoses Everywhere" (G. Ex. 14; T. 98; see T. 95-97; count 3, indictment 12,638 (R. 2-3)). In February 1958, Richard Lenz of Edwardsville, Illinois, received an advertising circular from petitioner stating, "Mail your orders to Roy A. Oakley, 627 West Eastland, Gallatin, Tenn-o-see (sic). * * * In our 11th year of mailing Gal Pics from Gallatin all over the globe" (G. Ex. 13; T. 90; see T. 86-89; count 4, indictment 12,638 (R. 3-4); see also T. 83-86; G. Ex. 12).

Petitioner testified that he received 150 to 200 letters a day containing orders for his material or request-

ing his catalogue (T. 259-260), and that he had filled orders from each state of the union and some 40 or 50 foreign countries (T. 260). He stipulated that he had mailed all of the material as charged in counts 1-6 and 8-9 of indictment 12,638 (T. 181, 197). When he was arrested by inspector Simon, he was found to be in possession of a mailing list containing several thousand names (T. 121).

2. In instructing the jury as to the standard it should apply in deciding whether the material petitioner sent through the mails was obscene, the trial judge quoted extensively from this Court's opinion in *Roth* v. *United States*, 354 U.S. 476 (see T. 394-397), and, in addition, charged as follows (R. 400-401):

> In determining [obscenity] the question is whether or not, to the average person, such material or any such material considered as a whole and applying contemporary community standards, whether the dominant theme of such material would appeal to prurient interest. It is not whether it appeals to you as an individual as having primarily a theme of this kind or whether it appeals to prurient interest, but it is whether to the average person of the community applying these contemporary community standards it would have this effect or impact; and, as I stated a moment ago, the material itself must be looked at in its entirety. You will not consider just one detached part of it, but you will view the entire item of evidence itself and determine what its dominant theme is, applying these standards and consider-

ing the evidence introduced here before you in its entirety.

The Court further instructs you in this case that reproductions of the human nude, even in unretouched form, are not, without more, obscene, * * * nudity per se is not obscene, the test being * * * whether or not the dominant theme of the material appeals to the prurient interest: Would it have that effect on the average person of the community applying contemporary community standards?

ARGUMENT

1. The argument petitioner makes (Pet. 6-9) that 18 U.S.C. 1461, as amended in 1958, is unconstitutionally vague was before the Court in *Collier* v. *United States*, certiorari denied, 365 U.S. 833, No. 571, O.T. 1960, and *Womack* v. *United States*, certiorari denied, 365 U.S. 859, No. 717, O.T. 1960. As in those cases, the clause challenged by petitioner is "[w]hoever * * * knowingly causes [non-mailable matter] to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed * * *." The purpose of the amendment was to make a violation of 18 U.S.C. 1461 a continuing offense, permitting prosecution, not only in the district where the mailing occurred (as under the pre-1958 statute), but also in the district of delivery and the intervening districts. See H. Conf. Rep. No. 2624, 85th Cong., 2d Sess.; S. Rep. No. 1839, 85th Cong., 2d Sess. In the light of this purpose, it is difficult to see how the language of which petitioner complains is vague or indefinite.

In any event, petitioner's sentence on the one-count indictment returned in Florida and transferred on his motion to the Middle District of Tennessee runs concurrently with the sentence imposed on the Tennessee indictment (the ten-count indictment). Since the total sentence is supportable on any one of the counts of the Tennessee indictment, which charged unlawful mailing, prior to the 1958 amendment of 18 U.S.C. 1461, petitioner is in no position to attack the amended language on which the Florida indictment was based. See, *e.g., Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

2. Petitioner's contention (Pet. 9-17) that the courts below applied a standard of obscenity in conflict with the decisions of this Court in *Roth* v. *United States*, 354 U.S. 476, and *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372, is without merit. The trial judge expressly instructed the jury (*supra*, p. 7) that

> reproductions of the human nude, even in unretouched form, are not, without more, obscene. * * * nudity per se is not obscene * * *.

The test for the jury, as the court phrased it, was—

> whether or not the dominant theme of the material appeals to the prurient interest: Would it have that effect on the average person of the community applying contemporary community standards?

Other portions of the charge defined prurient interest in the terms of the *Roth* decision. The court of appeals affirmed on the same principles (Pet. 23-24).

Essentially, petitioner's argument is that there was not sufficient evidence to permit a jury to find that the material he mailed appealed to the prurient interest, since the case involves only human nudity, and the human nude, as portrayed in art throughout the ages, is not obscene. But, as the *Roth* opinion makes clear (354 U.S. at 487-489), and as the trial court below so carefully instructed the jury, human nudity in art is one thing—the human nude so posed as to appeal to the prurient interest is quite another. Certainly it was not unreasonable for the jury to find that the photographs involved here, with their full exposure of the genital area, did appeal to the prurient interest, especially when viewed in relation to petitioner's method of advertising his wares, in which he used such phrases as "busty belles", "unretouched", "posed in the nude", "banned by bluenoses everywhere"; his representations of selling only to adults who were qualified as "student[s] of photography"; and his caution against disclosure of the source of the pictures except to "close" and "trusted" friends. Nor was it unreasonable for the jury to conclude in light of the evidence that this advertising did indeed give information where obscene material could be obtained. As the court below stated, "The subjects were so posed and slight apparel so added on some of the pictures, as to enhance the prurient response invited. Defendant's advertising material gave subtle assurance that lustful curiosity would be satisfied by purchase of his material" (Pet. 23-24). Thus, it cannot be said that petitioner's material was not obscene as a matter of

law. At most, there was posed a question of fact for the jury to resolve.

Nothing to the contrary was decided in *Sunshine Book Co.* v. *Summerfield, supra.* As the Fourth Circuit pointed out in *Collier* v. *United States,* 283 F. 2d 780, 782, certiorari denied, 365 U.S. 833, the photographs of nudes which the lower courts had erroneously held to be obscene in the *Sunshine* case were "only part of a publication devoted to the promotion or discussion of a particular idea such as the cult of nudism * * *." Here, as in the *Collier* and *Womack* cases, petitioner was engaged in nothing more than the peddling of obscenity. See also *Manual Enterprises, Inc.* v. *Day,* pending on petition for a writ of certiorari, No. 123, this Term.

3. Contrary to petitioner's final contention (Pet. 18-19), the trial court was correct in charging the jury that it was "immaterial whether the defendant knew or whether he believed that the materials mailed by him were obscene" (T. 399). Clearly, there is a vast difference between the requirement of *scienter* (see *Smith* v. *California,* 361 U.S. 147) and the question of petitioner's opinion that the material he had mailed was not legally obscene. As the trial court properly charged: "The inquiry for you is whether the materials were, in fact, obscene; and that does not depend, of course, upon the defendant's opinion. The defendant is merely required, insofar as knowledge is concerned, to know the contents of the materials and to know that he deposited or caused to be deposited such materials in the United States mails" (T. 399). See

Rosen v. *United States*, 161 U.S. 29, 42; *Roth* v. *United States*, *supra*, 354 U.S. at 491. Moreover, not only was there no objection to this instruction (see Rule 30, F.R. Crim. P.), but one of petitioner's counsel advised the trial judge that he thought "it represents the law" (T. 368-369, 377).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1961.

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SUPREME COURT, U. S.

No. 167

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ROY A. OAKLEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

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In The

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October Term, 1961

No. 167

Roy A. Oakley,

Petitioner

v.

United States of America,

Respondent

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's Order, dated October 23, 1961, denying the petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and therefor respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for Writ of Certiorari was denied without opinion. Petitioner herein feels that the jury did not comprehend adequately and properly the instructions of the Court nor the law applicable to the facts and evidence adduced at the trial in the Court below in the United States District Court for the Middle District of Tennessee. Further, from the verdict of the jury, considering the reasonably short length of time that the jury deliberated upon the case before returning its verdict on one indict-

ment, containing ten counts (one of which was dismissed on the motion of the Government) leaving nine separate counts for the jury's deliberation and consideration and a second indictment, containing one count, it appears that the jury did not understand the issues involved in this case, nor were they cognizant of the rights of the petitioner in this case afforded him under the law.

Further, it appears that the jury, in finding the defendant guilty on all counts of the indictment submitted to it by the Court herein, if not stampeded into an inarticulate general verdict of guilty, on all counts of the indictment, because the Government introduced into evidence unretouched nude photos showing an exposure of the genital area with respect to two counts of the indictment, then most surely the judgment of the jury was colored unreasonably and contrary to law, as to all other counts of the indictment, because of the introduction into evidence of unretouched nudes revealing the genital area; it is reasonable, we submit, to conclude that the trial of a case of this length, as was conducted in the trial court below, together with the myriad of exhibits introduced into evidence by the defense on behalf of the petitioner, that the jury did not and could not consider guilt or innocence of the petitioner as to each count of the indictment.

The petitioner was entitled, we submit, to be tried before a jury which by their verdict not only indicated and revealed that they understood the issues in the case, but also that the jury comprehended the law applicable to the issues herein, and applicable to each count of the indictment upon which petitioner was tried herein.

Point I

The petitioner submits that the first count of the ten count indictment upon which he was tried, and under which the Government introduced certain alleged advertising, as evidence, was in truth and in fact totally un-

related to all of the other counts in the indictment. Yet, the jury by its verdict makes it apparent that they did not understand this, notwithstanding the fact that they should so have comprehended this issue, so as to protect the rights of the defendant and afford him a fair trial. It is worthy of note that the petitioner had completely and utterly ceased and abandoned the use of the advertising material allegedly concerned in the first count of the ten count indictment at least, some eighteen months before he sent through the mails a single, unretouched nude photo, or any photographs unretouched, exposing the genital area. Hence, the alleged advertising material referred to in the first count of the ten count indictment did not and could not fairly or reasonably be related to anything contained in the other counts of the indictment or the single count indictment.

Consequently, the alleged advertising referred to in count one of the ten count indictment could hardly be concerned with the materials, including the unretouched nudes, concerned with any of the subsequent counts of the ten count indictment. Thus, the alleged advertising referred to on pages 4, 5, and 9 of the Government's brief in opposition to petitioner's Writ of Certiorari were hardly applicable to, or actually tied up with the unretouched nude photos showing the genital area. It seems that an articulate consideration and examination of the record, would reveal that the unretouched nude photos, including those showing the genital area, were not tied up with, nor concerned with advertising referred to in the first count of the ten count indictment nor with the advertising referred to on pages 4, 5, and 9 of the Government's brief in opposition to petitioner's Writ of Certiorari.

Point II

As suggested before, we urge that the jury in its deliberations of this case pursuant to the instructions of the Court, considering the law and facts and all of the evi-

dence, adduced at the trial of the case, particularly those numerous defense exhibits which were determined previously as a matter of law not to be obscene, and which were most surely applicable as a contemporary community standard in the community in which this jury resided, that the conclusion is inescapable that they did not understand the issues involved herein; and further, that they did not understand the law applicable to this case, notwithstanding their verdict. We respectfully submit that the trial Court below should have corrected this situation by granting a judgment for the defendant n.o.v. or a new trial in the light of and considering all of the circumstances surrounding the verdict of this jury on the two indictments involved herein, in which ten counts thereof were submitted to the jury for its determination.

The jury could not ignore the law applicable to this case which has long obtained, "that nudity per se is not obscene". Further, we respectfully submit that the jury could not ignore the law as applied by this court as to the determination of the standard of obscenity as set forth in the cases of *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958) and *Roth* v. *United States*, 354 U. S. 476 (1957).

Point III

Petitioner respectfully submits that a fair appraisal of all of the counts of the indictments considered by the jury in its deliberations and all of the evidence and the exhibits introduced by the government in support of said counts of the indictment, could hardly result in a determination that they appealed to the prurient interest, as defined, set forth and intended in the terms of the *Roth* decision; nor could the jury have fairly and reasonably concluded and subsequently find that any of the material with which the petitioner was charged with disseminating in this case, conflicted, actually, with the contemporary community standards obtaining in this community.

Most surely, petitioner submits that the evidence adduced by the government against him and charged as an appeal to prurient interest was no different than that obtaining as a contemporary community standard in this area; and petitioner submits that the evidence adduced by the Government against him was in many instances, even less likely to appeal to prurient interest or to be declared as obscene and appealing to prurient interest, than that which obtained as a contemporary community standard wherein the petitioner lived and where the jury resided. The exhibits offered in evidence by the defendant (Petitioner here) which were purchased from newsstands and from art stores open to the general public in the immediate area wherein this case was tried, clearly support this contention and position of the petitioner. Consequently, we respectfully submit that the jury could not ignore, as they did here, the determination of the standard, setting forth the appeal to prurient interest as declared by this Court in the case of *Roth* v. *United States* 354, U. S. 476 (1957). Failing this, the petitioner was prejudiced, indeed, and accordingly the rights and protection which the law afforded unto him in this case were denied this petitioner.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOSIAH LYMAN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 Subdivision 2, of the Rules of this Court.

JOSIAH LYMAN
Attorney for Petitioner